

Senate Bill 573

By: Senators Carter of the 13th and Cagle of the 49th

AS PASSED

AN ACT

To amend Article 1 of Chapter 2 of Title 8 and Article 3 of Chapter 3 of Title 44 of the Official Code of Georgia Annotated, relating to buildings generally and condominiums, so as to change certain provisions relating to condominium sales and repairs; to change certain provisions relating to resolution of construction defects; to clarify how builders and homeowners are required to operate under Part 2A relating to resolution of construction defects; to change conflicting language within Part 2A; to provide a better framework for dispute resolution; to change certain definitions; to change certain provisions relating to notice of claim and the response of the contractor to the claim; to change certain provisions relating to discovery of additional defects after original notice of a claim is given; to change certain provisions relating to the effect of a claimant's acceptance of settlement and subrogation of insurance; to change certain provisions relating to the notice to the consumer prior to beginning initial construction work; to change certain provisions relating to the prohibition against bribery of property or association managers; to change certain provisions relating to causes of action being created and the contractor's right to seek recovery from subcontractors or other professionals; to provide that the seller may withdraw escrow funds in excess of 1 percent of the purchase price of a condominium in order to fund construction and development of the condominium property; to provide for related matters; to provide for effective dates; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 1 of Chapter 2 of Title 8 of the Official Code of Georgia Annotated, relating to buildings generally, is amended by striking Part 2A, relating to resolution of construction defects, and inserting in lieu thereof the following:

"Part 2A

8-2-35.

The legislature finds, declares, and determines that Georgia needs an alternative method to resolve legitimate construction disputes that would reduce the need for litigation while adequately protecting the rights of homeowners. The legislature declares that an effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the contractor that the claimant asserts is responsible for the defect and providing the contractor with the opportunity to resolve the claim without litigation.

8-2-36.

As used in this part, the term:

- (1) 'Action' means any civil lawsuit, judicial action, or arbitration proceeding asserting a claim in whole or in part for damages or other relief in connection with a dwelling or common area caused by an alleged construction defect.
- (2) 'Association' means a corporation formed for the purpose of exercising the powers of the members of any common interest community.
- (3) 'Claimant' means anyone who asserts a claim concerning a construction defect.
- (4) 'Common area' means the common areas, improvements, and facilities that are owned or maintained by the association in a common interest community.
- (5) 'Construction defect' has the meaning assigned by a written, express warranty either provided by the contractor or required by applicable statutory law; if no written, express warranty or applicable statutory warranty provides a definition, then 'construction defect' means a matter concerning the design, construction, repair, or alteration of a dwelling or common area, of an alteration of or repair or addition to an existing dwelling, or of an appurtenance to a dwelling or common area on which a person has a complaint against a contractor. The term may include any physical damage to the dwelling or common area, any appurtenance, or the real property on which the dwelling or appurtenance is affixed proximately caused by a construction defect.
- (6) 'Contractor' means any person, firm, partnership, corporation, association, or other organization that is engaged in the business of designing, developing, constructing, or selling dwellings or common areas, alterations of or additions to existing dwellings or common areas, or the repair of such improvements. The term includes:

- (A) An owner, officer, director, shareholder, partner, or employee of the contractor;
- (B) Subcontractors and suppliers of labor and materials used by a contractor in a dwelling or common area; and
- (C) A risk retention group registered under applicable law, if any, that insures all or any part of a contractor's liability for the cost to repair a construction defect.

(7) 'Dwelling' means a single-family house, duplex, or multifamily unit designed for residential use in which title to each individual residential unit is transferred to the owner under a condominium or cooperative system. A dwelling includes the systems, other components, improvements, other structures, or recreational facilities that are appurtenant to the house, duplex, or multifamily unit at the time of its initial sale but not necessarily a part of the house, duplex, or multifamily unit.

(8) 'Serve' or 'service' means deposit in the United States mail, postage prepaid for delivery by certified mail, return receipt requested or statutory overnight delivery to the last known address of the addressee. For a corporation, limited partnership, limited liability company, or other registered business organization, it means service on the registered agent or other agent for service of process authorized by law.

8-2-37.

If a claimant files an action without first complying with the requirements of this part, on application by a party to the action, the court or arbitrator shall stay the action until the claimant has complied with the requirements of this part. To the extent that the action includes a cause of action for damages due to personal injury or death, such cause of action shall not be subject to stay pursuant to this Code section.

8-2-38.

(a) In every action subject to this part, the claimant shall, no later than 90 days before initiating an action against a contractor, provide service of written notice of claim on that contractor. The notice of claim shall state that the claimant asserts a construction defect claim or claims and is providing notice of the claim or claims pursuant to the requirements of this part. The notice of claim shall describe the claim or claims in detail sufficient to explain the nature of the alleged construction defects and the results of the defects. In addition, the claimant shall provide to the contractor any evidence that depicts the nature and cause of the construction defect, including expert reports, photographs, and videotapes, if that evidence would be discoverable under evidentiary rules.

(b) Within 30 days after service of the notice of claim by a claimant required in subsection (a) of this Code section, each contractor that has received the notice of claim shall serve on the claimant, and on any other contractor that has received the notice of claim, a written response to the claim or claims, which either:

(1) Offers to settle the claim by monetary payment, the making of repairs, or a combination of both, without inspection; or

(2) Proposes to inspect the dwelling or common area that is the subject of the claim.

(c) If the contractor wholly rejects the claim and will neither remedy the alleged construction defect nor settle the claim or does not respond to the claimant's notice of claim within the time stated in subsection (b) of this Code section, the claimant may bring an action against the contractor for the claims described in the notice of claim without further notice except as otherwise provided under applicable law. A contractor that does not respond to a notice of claim within the time prescribed by subsection (b) of this Code section may not claim or assert that the absence of documents required to be provided with the notice of claim under subsection (a) of this Code section relieved the contractor from the contractor's obligation to respond to the notice of claim.

(d) If the claimant rejects the settlement offer made by the contractor, the claimant shall provide written notice of the claimant's rejection to the contractor and, if represented by legal counsel, his or her attorney. The notice shall include the reasons for the claimant's rejection of the contractor's proposal or offer. If the claimant believes that the settlement offer:

(1) Omits reference to any portion of the claim; or

(2) Was unreasonable in any manner,

the claimant shall in his or her written notice include those items that claimant believes were omitted and set forth in detail all known reasons why the claimant believes the settlement offer is unreasonable.

(e) If a proposal for inspection is made pursuant to paragraph (2) of subsection (b) of this Code section, the claimant shall, within 30 days of receiving the contractor's proposal, provide the contractor and its subcontractors, agents, experts, and consultants prompt and reasonable access to the dwelling or common area to inspect the dwelling or common area, document any alleged construction defects, and perform any destructive or nondestructive testing required to fully and completely evaluate the nature, extent, and cause of the claimed defects and the nature and extent of any repairs or replacements that may be necessary to remedy the alleged defects. If destructive testing is required, the contractor

shall give claimant advance notice of such tests and shall, after completion of the testing, return the dwelling or common area to its pretesting condition. If any inspection or testing reveals a condition that requires additional testing to allow the contractor to fully and completely evaluate the nature, cause, and extent of the construction defect, the contractor shall provide notice to the claimant of the need for such additional testing and the claimant shall provide prompt and reasonable access as set forth in this Code section. If a claim is asserted on behalf of owners of multiple dwellings or multiple owners of units within a multifamily complex, the contractor shall be entitled to inspect each of the dwellings or common areas which may be or appear to be affected by the alleged defect. The contractor shall commence and diligently pursue completion of all the desired inspections within the 30 day period after delivery of the contractor's written proposal. Inspection shall be completed within the same 30 day period if reasonable or within a reasonable period thereafter if completion is not reasonable within 30 days.

(f) Within 14 days following completion of the inspection and testing set forth in this Code section, the contractor shall serve on the claimant:

- (1) A written offer to fully or partially remedy the construction defect at no cost to the claimant. Such offer shall include a description of any additional construction necessary to remedy the defect described in the claim and an anticipated timetable for the completion of such construction;
- (2) A written offer to settle the claim by monetary payment;
- (3) A written offer including a combination of repairs and monetary payment; or
- (4) A written statement that the contractor will not proceed further to remedy the defect, along with the reasons for such rejection.

(g) If a claimant accepts a contractor's offer made pursuant to paragraph (1), (2), or (3) of subsection (f) of this Code section and the contractor does not proceed to make the monetary payment or remedy the construction defect or both within the agreed timetable, the claimant may bring an action against the contractor for the claim described in the notice of claim without further notice except as otherwise provided by applicable law. In such a situation, the claimant may also file the contractor's offer and claimant's acceptance, and such offer and acceptance will create a rebuttable presumption that a binding and valid settlement agreement has been created and should be enforced by the court or arbitrator.

(h) If a claimant receives a written statement that the contractor will not proceed further to remedy the defect or if the contractor fails to serve the claimant with the required written offer or written statement within the time prescribed by subsection (f) of this Code section,

the claimant may bring an action against the contractor for the claim described in the notice of claim without further notice except as otherwise provided by applicable law. The contractor's written statement shall include all known reasons for the rejection of the claim.

(i) If the claimant rejects the offer made by the contractor to remedy the construction defect or to settle the claim by monetary payment or a combination of each, the claimant shall serve written notice of the claimant's rejection on the contractor. The notice shall include all known reasons for the claimant's rejection of the contractor's offer.

(j) Upon receipt of a claimant's rejection and the reasons for such rejection, the contractor may, within 15 days of receiving the rejection, make a supplemental offer of repair or monetary payment or both to the claimant.

(k) If the claimant rejects the supplemental offer made by the contractor to repair the construction defect or to settle the claim by monetary payment or a combination of each, the claimant shall serve written notice of the claimant's rejection on the contractor. The notice shall include all known reasons for the claimant's rejection of the contractor's supplemental settlement offer.

(l) If a claimant rejects a reasonable offer, including any reasonable supplemental offer, made as provided by this part or does not permit the contractor to repair the construction defect pursuant to an accepted offer of settlement, the claimant may not recover an amount in excess of:

- (1) The fair market value of the offer of settlement or the actual cost of the repairs made;
- or
- (2) The amount of a monetary offer of settlement.

For purposes of this subsection, the trier of fact shall determine the reasonableness of an offer of settlement made pursuant to this part. If the claimant has rejected a reasonable offer, including any reasonable supplemental offer, and any other law allows the claimant to recover costs and attorneys' fees, then the claimant may recover no costs or attorneys' fees incurred after the date of his or her rejection.

(m) Any claimant accepting the offer of the contractor to remedy a construction defect shall do so by serving the contractor with a written notice of acceptance within 30 days after receipt of the offer. If no response is served upon the contractor within the 30 day period, then the offer shall be deemed accepted.

(n) If a claimant accepts a contractor's offer to repair a construction defect described in a notice of claim, the claimant shall provide the contractor and its subcontractors, agents,

experts, and consultants prompt and unfettered access to the dwelling or common area to perform and complete the construction by the timetable stated in the settlement offer.

(o) If, during the pendency of the notice, inspection, offer, acceptance, or repair process, an applicable limitations period would otherwise expire, the claimant may file an action against the contractor, but such action shall be immediately stayed until completion of the notice of claim process described in this part. This subsection shall not be construed to:

(1) Revive a statute of limitations period that has expired prior to the date on which a claimant's written notice of claim is served; or

(2) Extend any applicable statute of repose.

(p) After the sending of the initial notice of claim, a claimant and a contractor may, by written mutual agreement, alter the procedure for the notice of claim process described in this part.

8-2-39.

(a) A construction defect that is discovered after a claimant has provided a contractor with the initial claim notice may not be alleged in an action until the claimant has given the contractor who performed the original construction:

(1) Written notice of claim regarding the alleged defect as required by Code Section 8-2-38; and

(2) An opportunity to resolve the notice of claim in the manner provided in Code Section 8-2-38.

(b) A construction defect that is discovered during the pendency of an action filed in compliance with this part may be added as a supplemental or additional claim to the pending action if failure to add the claim would prejudice any legal rights of the claimant or the contractor; provided, however, that the claimant shall comply with the requirements of subsection (a) of this Code section, and such action shall be immediately stayed until completion of the notice of claim process, unless otherwise agreed by the parties.

8-2-40.

(a) If a claimant accepts an offer made in compliance with this part and the contractor fulfills the offer in compliance with this part:

(1) The claimant shall thereafter be barred from bringing an action for the claim described in the notice of claim; and

(2) A contractor's performance of repairs or payment of money to a claimant made pursuant to this Code section shall not, by itself, create insurance coverage or otherwise affect the mutual rights and obligations of the parties under a contractor's liability insurance policy or, by itself, be considered a voluntary payment of an otherwise valid insured loss.

(b) An insurer paying a claim under this part shall be subrogated to the rights of the claimant to whom the amounts were paid against the person causing the construction defect, damages, or other reason for payment to the extent that claim payments were made, except that the insurer shall be required to pay any applicable part of costs, expenses, and attorneys' fees incurred in connection therewith.

8-2-41.

(a) Upon entering into a contract for sale, construction, or improvement of a dwelling, the contractor shall provide notice to the owner of the dwelling of the contractor's right to resolve alleged construction defects before a claimant may commence litigation against the contractor. Such notice shall be conspicuous and may be included as part of the contract.

(b) The notice required by subsection (a) of this Code section shall be in substantially the following form:

GEORGIA LAW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR OTHER ACTION FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR WHO CONSTRUCTED, IMPROVED, OR REPAIRED YOUR HOME. NINETY DAYS BEFORE YOU FILE YOUR LAWSUIT OR OTHER ACTION, YOU MUST SERVE ON THE CONTRACTOR A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE. UNDER THE LAW, A CONTRACTOR HAS THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS OR BOTH. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY A CONTRACTOR. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER ACTION.

8-2-42.

(a) A person shall not provide or offer to provide anything of value, directly or indirectly, to a property manager of an association or to a member or officer of an association to

induce the property manager, member, or officer to encourage or discourage the association to file a claim for damages arising from a construction defect. As used in this Code section, the term 'anything of value' shall not include payments, services, or other items of value which the recipient would otherwise be entitled to receive under an existing contract.

(b) A property manager retained by an association shall not accept anything of value, directly or indirectly, in exchange for encouraging or discouraging the association that he or she manages to file a claim for damages arising from a construction defect.

(c) A member or officer of an association shall not accept anything of value, directly or indirectly, in exchange for encouraging or discouraging the association of which he or she is a member or officer to file a claim for damages arising from a construction defect.

(d) A person who knowingly violates subsection (a), (b), or (c) of this Code section shall be guilty of a misdemeanor.

(e) An association may bring an action against a contractor to recover damages resulting from construction defects in the common area of a common interest community, provided that:

(1) The members of the association have voted to approve commencement of an action by two-thirds of the votes cast, by statutory written ballot as provided in Code Section 14-3-708 or have approved commencement of an action by the affirmative vote of at least two-thirds of the total membership at a meeting of the members at which a quorum is present;

(2) The board of directors of the association and the contractor have met in person and conferred in a good faith attempt to resolve the association's claim, or the contractor has definitively declined or ignored the requests to meet with the board of directors of the association; and

(3) The association has otherwise satisfied all of the preaction requirements for a claimant to commence an action as set forth in this part.

(f) At least three business days in advance of the meeting at which the association members vote or at the time a statutory written ballot is circulated to the members to obtain approval of an action to recover damages resulting from construction defects in the common area of a common interest community, the association shall provide each owner a copy of the notice of claim provided to the contractor and an additional written description of claims and the reasons the board of the association is recommending consideration of the litigation.

(g) An association or an attorney for an association shall not employ a person to perform destructive tests to determine any damage or injury to a dwelling or common area caused by a construction defect unless:

- (1) The person is licensed as a contractor pursuant to law;
- (2) The association has obtained the prior written approval of each owner whose dwelling will be directly affected by such testing;
- (3) The association or the person so employed obtains all permits required to conduct such tests and to repair any damage resulting from such tests; and
- (4) Reasonable prior notice and opportunity to observe the tests is given to the contractor against whom an action may be brought as a result of the tests.

(h) The board of directors of an association may, without giving notice to the owners, employ a contractor and such other persons as are necessary to make such immediate repairs to a common area within the common interest community as are required to protect the health, safety, and welfare of the owners.

8-2-43.

(a) Nothing in this part shall create any cause of action on behalf of any claimant or contractor.

(b) This part does not apply to a contractor's right to seek contribution, indemnity, or recovery against a subcontractor, supplier, or design professional for any claim made against a contractor by a claimant.

(c) In the event of any conflict or inconsistency between the provisions of this part and the provisions of any contract between a claimant and a contractor, the provisions of the contract shall govern and control.

(d) This part shall not apply to a contractor who is not required to be licensed under Chapter 41 of Title 43."

SECTION 2.

Article 3 of Chapter 3 of Title 44 of the Official Code of Georgia Annotated, relating to condominiums, is amended by striking Code Section 44-3-112, relating to escrow of deposits made or other payments made prior to closing on a condominium unit, and inserting in lieu thereof the following:

"44-3-112.

(a) Any deposit or other payment made prior to closing with respect to the first bona fide sale of each residential condominium unit for residential occupancy by the buyer, any member of the buyer's family, or any employee of the buyer shall be held in escrow until it is delivered at closing, delivered to the seller in accordance with subsection (b) of this Code section, or delivered to the person or persons entitled thereto upon breach of the contract for the sale. Such escrow funds shall be deposited in a separate account designated for this purpose; provided, however, that, in the event any such deposit is held by a real estate broker licensed under the laws of this state, such funds may be placed in such broker's escrow account instead of a separately designated account.

(b) If the contract for sale of the condominium unit so provides and the purchase price of the condominium unit is not less than \$150,000.00, the seller may withdraw escrow funds in excess of 1 percent of the purchase price from the escrow account required by subsection (a) of this Code section when the construction of improvements has commenced. The seller shall only use the funds in the actual construction and development of the condominium property in which the unit to be sold is located. However, no part of these funds may be used for salaries, commissions, expenses of real estate licensees, or advertising purposes. A contract which permits use of the advance payments for these purposes shall be initialed by the buyer and include the following caveat in boldfaced type or capital letters no smaller than the largest type on the first page of the contract: ANY PAYMENT IN EXCESS OF 1 PERCENT OF THE PURCHASE PRICE MADE TO THE SELLER PRIOR TO CLOSING PURSUANT TO THIS CONTRACT MAY BE USED FOR CONSTRUCTION PURPOSES BY THE SELLER."

SECTION 3.

(a) This section and Sections 1 and 4 of this Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

(b) Section 2 of this Act shall become effective on July 1, 2006.

(c) This Act shall only apply with respect to causes of actions or claims arising on or after the effective date of this Act, and any prior causes of action or claims shall continue to be governed by prior law.

SECTION 4.

All laws and parts of laws in conflict with this Act are repealed.